

**Cour
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**International
Criminal
Court**

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Date: **18 May 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public Document

**Common Legal Representative's submissions pursuant to the "Order Scheduling
First Status Conference and Other Matters"**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

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I. INTRODUCTION

1. The Common Legal Representative of 592 victims authorised to participate in the present case (the “Common Legal Representative”)¹ submits the following observations on the matters to be discussed at the status conference to be held on 23rd May 2016.

II. BACKGROUND

2. On 4 May 2016, the Single Judge of Trial Chamber IX (respectively the “Single Judge” and the “Chamber”) issued the “Order Scheduling First Status Conference and Other Matters” (the “Order”).² In particular, the Single Judge instructed all participants to file, by 18 May 2016, their submissions on the following items:

- a. Disclosure of any outstanding material in the Prosecution’s possession;
- b. Estimated number of: (i) witnesses and any known protection issues, including liaising with the VWU and any possible referrals to the Court’s witness protection programme; (ii) hours required for the parties to present their evidence and (iii) documentary and other non-testimonial evidence to be relied upon at trial.
- c. Languages to be used in the proceedings - in particular, the languages spoken by the witnesses the parties intend to call;
- d. Estimated length of opening statements;
- e. The time required for the preparation of a pre-trial brief;

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

² See the “Order Scheduling First Status Conference and Other Matters” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-432, 4 May 2016.

- f. New victim applications for participation which have been received since the confirmation proceedings deadline and how many more are expected in the near future;
- g. Commencement date of the trial; and
- h. Any other matters.³

III. SUBMISSIONS

Regarding issues under item (a) and (e)

3. The Common Legal Representative has no submissions on matters under items (a), and (e) of the Order which are primarily addressed to the Prosecution.

Regarding issues under item (b)

4. The Common Legal Representative acknowledges that the Single Judge did not request the legal representatives to make specific submissions on the matter. However, the Common Legal Representative wishes to inform the Chamber that, at present, she is not in a position to identify amongst the victims she represents the ones for whom she would either seek the Chamber's authorisation to call as witnesses or otherwise request to appear in person before the Chamber to present their views and concerns.

5. This determination will be made at a later stage of the proceedings taking into account the relevant interests of the victims and the extent and type of evidence on which the Prosecution will rely on at trial.

6. In this regard, the Common Legal Representative wishes to underline the important distinction drawn in the jurisprudence of the Court to date between the

³ *Idem.*, para. 3.

right for legal representatives to call victims to give evidence and the right of victims to present their views and concerns in person before the Chamber.⁴

7. In the *Lubanga* case, Trial Chamber I recognised “[t]he unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected [...] if the Court considers that course appropriate [and in as much as it does not] undermine the integrity of these criminal proceedings”.⁵ Trial Chamber I also drew a distinction between the process of victims expressing their views and concerns and the process of victims giving evidence.⁶

8. However, it is in the *Bemba* case that, for the first time, the legal representatives were allowed to both apply for some of their clients to present their views and concerns in person before the Chamber (or via video-link) and to call some victims to give evidence at trial.⁷ Trial Chamber III emphasised that the “[t]hreshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person”.⁸ The Chamber noted that

⁴ See the “Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08” (Trial Chamber III), No. ICC-01/05-01/08-2220, 24 May 2012, paras. 7-8 and paras. 9-11.

⁵ See the “Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial” (Trial Chamber I), No. ICC-01/04-01/06-2032-Anx, 26 June 2009, paras. 17 and paras. 25-27.

⁶ *Idem*, paras. 17, 25 - 27. See also the “Decision on the Modalities of Victim Participation at Trial” (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 69-71.

⁷ See the “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims” (Trial Chamber III), No. ICC-01/05-01/08-2138, 22 February 2012, para. 20. In the Kenyan cases, the same rights were also granted to the legal representatives. Trial Chamber V envisaged it but no specific decision has been issued so far detailing the procedure that the legal representatives may follow to call victims to share their views and concerns or to present evidence. See the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012, paras. 56-58 and the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, paras. 55-57. See also the “Decision on the participation of victims in the trial proceedings” (Trial Chamber IV), No. ICC-02/05-03/09-545, 20 March 2014, paras. 22-41.

⁸ See the “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims” *supra* note 7, para. 20.

victims presenting their views and concerns are in fact presenting unsworn statements to the Chamber.⁹

9. The Common Legal Representative recalls the established jurisprudence to date and advocates for the possibility of diverging from it on one particular aspect. The necessity that victims will relinquish their identity when appearing to give evidence as witnesses is in perfect line with the general rules and proceedings applying to all participants at the trial stage.¹⁰ However, the Common Legal Representative submits that the victims appearing to present their views and concerns before the Chamber through unsworn statements should not automatically be required to lift their anonymity. Instead, said issue should be considered on a case-by-case basis, depending on the security situation of the victims concerned.

10. The Common Legal Representative agrees with the principle established according to which victims who will appear before the Chamber should be the best-placed to give evidence or to present views and concerns, and that their appearance should not be cumulative with what has already been presented in the case.¹¹ The Common Legal Representative observes that there is no need to depart from the procedure established to date in other cases, essentially requiring the legal representative to file a written request towards the expected end of the Prosecution case,¹² explaining the relevance of the victim's evidence/views and concerns to the charges, how the victim's evidence/views and concerns would assist in the Chamber's determination of the truth, the estimated time for the appearance, and

⁹ See the "Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08" *supra* note 4, para. 7.

¹⁰ See the "Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims" (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011, paras. 12-15 and para. 19.

¹¹ *Idem.*, paras. 12-15.

¹² See the "Order regarding applications by victims to present their views and concerns or to present evidence" (Trial Chamber III), No. ICC-01/05-01/08-1935, 21 November 2011, para. 3. See also the "Decision on Directions for the Conduct of the Proceedings" (Trial Chamber III), No. ICC-01/05-01/08-1023, 19 November 2010, para. 5. See more recently, the "Decision adopting amended and supplemented directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-498-Anx A, 4 May 2016, paras. 18-21.

whether they need to be afforded in-court protective measures. Such a request shall include a detailed summary/statement of the aspects which will be addressed by each victim, in one of the working languages of the Court.¹³

11. For the presentation of views and concerns, the Chamber may envisage the possibility for victims to either present their views in person or in writing. In the case of the appearance in person, the Common Legal Representative suggests adopting the procedure as established in the *Bemba* case, so that the legal representatives would guide the victims through their presentation by only facilitating it, eventually with a few questions, and that the victims will not be questioned by the parties but by the judges.¹⁴ In light of the importance for victims to be able to express their views and to share their experience with the judges, the Common Legal Representative favours their appearance in person (either by video-link or in The Hague) rather than in writing.

12. In relation to the right of legal representatives to call witnesses – other than victims, the jurisprudence has underlined that witnesses called by the legal representatives shall be able to provide important information that was not hitherto included in the evidence presented by the parties, and shall make a genuine contribution to the determination of the truth.¹⁵ In particular, Trial Chamber I considered whether the testimony “[i] affects the victim’s personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with the rights of the accused, in particular the

¹³ See the “Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims” (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011, paras. 12-15.

¹⁴ See the “Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08” *supra* note 4, paras. 7-8. See also the “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims” *supra* note 7, para. 7.

¹⁵ See the “Decision on the Modalities of Victim Participation at Trial” *supra* note 6, paras. 94-97. Trial Chamber I appointed an expert on names and other social conventions in the DRC following the legal representatives’ submissions in this regard. See the “Instructions to the Court’s expert on names and other social conventions in the Democratic Republic of Congo” (Trial Chamber I), No. ICC-01/04-01/06-1934, 5 June 2009, para. 12.

right to adequate time and facilities to prepare a defence".¹⁶ Said Chamber further directed the legal representative to file a schedule of the anticipated testimonies, detailing their expected lengths and the order in which they may appear.¹⁷ The Common Legal Representative favours this approach and indicates that she will be in a position of filing a request for calling witnesses towards the end of the Prosecution case when she will be able to better assess if the proposed testimony complies with the above mentioned criteria.

13. Finally, on the issue of submission of documentary and other non-testimonial evidence, the Common Legal Representative submits that the principles of being relevant to the victims' interests, non-duplicative and contributing to the determination of the truth identified above should equally apply.¹⁸

Regarding issues under item (c)

14. The Common Legal Representative informs the Chamber that the languages mostly spoken by the victims she represents are Acholi and English, and that, in case of appearance, it is most likely that they will use one of these two languages. However, the Common Legal Representative also notes that a minority of victims speaks Ateso and Luo.

Regarding issues under item (d)

15. The Common Legal Representative wishes to underline that the opening statements represent a unique opportunity for the victims to convey to the Chamber their views and concerns, and particularly to make use of their right to explain the reasons for their participation.

¹⁶ See the "Decision on the participation of victims in the trial proceedings" *supra* note 7, para. 25.

¹⁷ *Idem*, para. 26.

¹⁸ See, more recently, the "Decision adopting amended and supplemented directions on the conduct of the proceedings" *supra* note 12, para. 20.

16. With regard to the length of opening statements, the Common Legal Representative estimates that an hour will be sufficient for her to present the views of her clients. She also wishes to inform the Chamber that she is considering the possibility for individual victims to directly present their views and concerns during the opening statements.¹⁹

17. The Common Legal Representative further notes that, in accordance with the practice developed in other cases, all participants are usually directed to disclose, before the start of the trial, copies of the material they intend to rely on during their opening statements, unless said material is on the Prosecution's list of evidence.²⁰

18. In addition, participants are normally requested to make written objections, if any, in relation to said material.²¹ In light of the existing jurisprudence on the issue, the legal representatives should benefit from said disclosure and from the possibility to make objections, if any.

Regarding issues under item (f)

19. Concerning the victims already authorised to participate in the case at the pre-trial stage, the Common Legal Representative understands that all of them are automatically admitted to participate at the trial stage without their victim status being determined *de novo*. In this regard, the Common Legal Representative informs the Chamber that there has been no change in circumstances in relation to the 592 victims she represents.

¹⁹ See the "Decision on victims' representation and participation" *supra* note 7, para. 73.

²⁰ See the "Decision on the Conduct of Trial Proceedings (General Directions)" (Trial Chamber V(A)), No. ICC-01/09-01/11-847-Corr, 9 August 2013, para. 4. See also the instruction issued by Trial Chamber I, transcript of the hearing held on 16 January 2009, ICC-01/04-01/06-T-104-ENG ET WT, pp. 45-47.

²¹ See the "Decision No. 2 on the Conduct of Trial Proceedings (General Directions)" (Trial Chamber V(A)), No. ICC-01/09-01/11-900, 3 September 2013, para. 11. See also the instruction issued by Trial Chamber I, transcript of the hearing held on 16 January 2009, ICC-01/04-01/06-T-104-ENG ET WT, pp. 45-47.

20. Concerning the new applications for participation received after the confirmation proceedings deadline, the Common Legal Representative favours the approach already adopted at the pre-trial stage concerning the procedure for admission of victims to participate in the proceedings.²² Indeed, said approach allows for the handling of victims' applications in an efficient manner and expedites the proceedings. Moreover, in light of the potential high number of victims, the Common Legal Representative also favours the use of the simplified application form.

21. The Common Legal Representative wishes to draw the attention of the Chamber to the fact that during her missions in the field to the different locations where affected communities reside, numerous victims have expressed their wish to ask for participation in the proceedings. For what the Common Legal Representative was able to observe, the potential number of applicants is high and therefore she advocates for an adequate time for victims to file their applications with the Registry. The Common Legal Representative also notes that, while, in accordance with regulation 85(3) of the Regulations of the Court, victims shall file their applications, to the extent possible, before the start of the stage of the proceedings to which they wish to participate, they can do so throughout the proceedings.

Regarding issues under item (g)

22. The Common Legal Representative informs the Chamber that the victims have already indicated their wish that the trial starts as soon as practicable and without any undue delay. During various meetings held with the Common Legal Representative, the victims expressed their wish for trial proceedings to be carried out in an expeditious manner, and made clear their strong opposition to any delay with regard to the commencement of the trial.

²² See the "Decision concerning the procedure for admission of victims to participate in the proceedings in the present case" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-299, 3 September 2015.

23. The Common Legal Representative acknowledges the intention of the Chamber to start the trial before the end of the year. Taking into account the right of the Accused to be tried without delay and the right of victims to be afforded a reasonable time to apply for participation, the Common Legal Representative indicates that end of October or beginning of November 2016 seems a reasonable date for the start of the trial.

Regarding issues under item (h)

24. The Common Legal Representative wishes to address several matters related to the conduct of the proceedings.

Issues related to the conduct of the proceedings

25. The Common Legal Representative favours the recently adopted practices in the *Bemba et al.* and in the *Gbagbo and Blé Goudé*²³ trials with the aim of enhancing the efficiency and expeditiousness of the proceedings.

26. In particular, the Common Legal Representative supports the recent practice on the submission of evidence, according to which each item presented has to be considered submitted and the assessment of the relevance, probative value and potential prejudice of each item of evidence shall be considered at the time of rendering the judgement pursuant to article 74(2) of the Rome Statute;²⁴ the favour for orality in the proceedings, according to which the arguments of the participants and their requests are presented in the courtroom as much as feasible;²⁵ the

²³ See the “Decision adopting amended and supplemented directions on the conduct of the proceedings” Anx A, *supra* note 12.

²⁴ See the “Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf)” (Trial Chamber VII), No. ICC-01/05-01/13-1285, 24 September 2015, paras. 8-16 and para. 17. See also the “Decision on the submission and admission of evidence” (Trial Chamber I), No. ICC-02/11-01/15-405, 29 January 2016, para. 12.

²⁵ See the oral decision issued by Trial Chamber I, transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 36, lines 10-18.

simplified practice for the legal representatives to request to question witnesses;²⁶ the mode of questioning²⁷ and use of documents.²⁸

27. In relation to the different Protocols adopted in other cases, the Common Legal Representative argues for the need of adopting a Protocol on Dual Status Witnesses,²⁹ and a Protocol on the practices used to prepare and familiarise witnesses for giving testimony before the Court (which could include a part on vulnerable witnesses).³⁰

28. In relation to the procedures for redactions,³¹ the Common Legal Representative notes that said procedure was adopted at the pre-trial stage of the proceedings at a time at which the Chamber had not yet decided on victims' participation in the proceedings.

29. In this regard, the Common Legal Representative underlines that the practice has shown that in the course of the proceedings – and particularly at trial – lifting of redactions in application forms or in documents attached to application forms may become a live issue. Therefore, she contends that some of the categories contemplated in the adopted procedure (i.e. Category A.5 identifying and contact information of intermediaries) could also be applicable to said material; while other categories may not be covered by the relevant decision (i.e. information related to the kinship or third parties). Therefore, the Common Legal Representative wishes to

²⁶ See the oral decision issued by Trial Chamber I, transcript of the hearing held on 3 February 2016, No. ICC-02/11-01/15-T-13-CONF-ENG ET (still classified as confidential but rendered in open session), p. 2, lines 17-25.

²⁷ See the "Decision adopting amended and supplemented directions on the conduct of the proceedings" Anx A, *supra* note 12, para. 15-17 and paras. 27-32.

²⁸ *Idem*, paras. 34-38 and paras. 43-47.

²⁹ In this regard, see for instance, the "Decision adopting mechanisms for exchange of information on individuals enjoying dual status" (Trial Chamber I), No. ICC-02/11-01/15-199 and Anx, 31 August 2015.

³⁰ In this regard, see for instance, the Annex to the "Decision on Witness Preparation and Familiarisation" (Trial Chamber VII), No. ICC-01/05-01/13-1252-Anx, 15 September 2015.

³¹ See the "Decision on issues related to the disclosure and exceptions thereto" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-224, 23 April 2015.

stress the importance of consulting the legal representatives on any request for lifting redactions which may impact on previous rulings granting said redactions in application forms and related material of participating victims and that legal representatives shall be afforded an opportunity to challenge before the Chamber any such request.

30. The Common Legal Representative has no observations on the e-court protocol³² and the protocol for handling confidential information and contacting witnesses of other participants³³, as already adopted at the pre-trial stage of the case.

In situ proceedings and/or site visit

31. The Common Legal Representative stresses the importance of holding proceedings in the country where the crimes were committed because this course of events is very likely to provide maximum access to a large public, the victims and the affected communities. This also contributes to the transparency of and accessibility to the proceedings, as well as to a wide dissemination of information and to making justice more visible for the victims. In this regard, the Common Legal Representative requests the Chamber to consider holding the opening statements and some critical parts of the proceedings in Uganda.

32. Should the holding of proceedings *in situ* not be possible, as an alternative, the Common Legal Representative notes that the Chamber could consider holding a judicial site visit towards the middle or the end of the Prosecution's case when it will be fully acquainted with the Prosecution's case. This course of events will have a significant impact on the effective participation of victims in the proceedings insofar as they will feel that their concerns are duly taken into account and that justice is

³² See the Annex 1 to the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-203-Anx 1, 27 February 2015.

³³ See the "Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-339-Anx 1, 11 November 2015.

being done. The victims have already expressed to the Common Legal Representative their wish that the Judges visit the places where the crimes were committed in order to fully understand the events they suffered from.

33. The only concern expressed so far by the victims is the presence of the Accused on Ugandan soil. In particular, the victims indicated that his presence *in situ* is not desirable for security reasons. Indeed, they fear possible episodes of violence in the event the Accused returns to Uganda.

Agreement between the Defence and the Prosecution as to facts or evidence

34. The need to take into consideration the interests of the victims with regard to any agreement between the Defence and the Prosecution as to facts or evidence in a given case is clearly reflected in rule 69 of the Rules of Procedure and Evidence. Pursuant to this provision, the *“Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interest of justice, in particular the interests of the victims”*.³⁴

35. The language used in the provision expressly states that no agreement between the parties may become effective and binding in a manner detrimental to victims’ interests. Moreover, providing victims with the possibility to submit their views and concerns in relation to such agreements will benefit the overall effectiveness of the proceedings. Furthermore, it clearly falls within the power of a Trial Chamber under article 69(3) of the Rome Statute *“to request the submission of all evidence that it considers necessary for the determination of the truth”*.

36. This reading of rule 69 of the Rules is further supported by the jurisprudence of the Court. In particular, in the *Lubanga* case, Trial Chamber I ordered the parties to prepare a draft schedule of agreed facts which then will be served on participating

³⁴ See Rule 69 of the Rules of Procedure and Evidence (emphasis added).

victims.³⁵ In said case, victims were authorised to submit their observations on the facts and evidence agreed between the parties.³⁶

37. The Common Legal Representative submits that this approach is the most consistent with the legal framework of the Court. First, it enables victims to comprehend issues covered by any agreements between the parties and to envisage the potential impact that they could have on their interests, as well as on the proceedings as a whole. Second, the notification of agreements to victims prior to any decision on the merits by the Chamber will contribute to the effectiveness and the meaningfulness of victims' participation at trial.

38. Moreover, in this fashion, the Common Legal Representative will have an opportunity to make specific submissions on how the interests of the participating victims will be affected by the proposed agreements. While the Common Legal Representative does not consider necessary to be associated to the discussions amongst the parties, any agreements reached between the parties under rule 69 of the Rules should be notified to the legal representatives for observations.

Common Legal Representation

39. Without prejudice to any further determination of the Chamber in the matter, the Common Legal Representative informs the Chamber of her availability to continue to represent the interests of the participating victims at the trial stage and of the need to maintain a Field Counsel position within the team.

40. Should the current system of legal representation be retained, the Common Legal Representative wishes to draw the attention of the Chamber on the need to review the manner in which victims have been allocated to the two legal

³⁵ See the "Decision on agreements between the parties" (Trial Chamber I), No. ICC-01/04-01/06-1179, 20 February 2008, para. 11.

³⁶ *Idem*, para. 13.

representatives' teams. Indeed, it has come to her knowledge that certain members of the same family happened to be included part in her group and part in the other team group. A certain number of them have contacted the Common Legal Representative and the Field Counsel asking to be included in the same group. The Field Counsel is currently collecting information in this regard and the Common Legal Representative will be able to share said information with the Registry for the appropriate follow-up in the near future, subject to any instruction issued by the Chamber.

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined.

Paolina Massidda
Principal Counsel

Dated this 18th day of May 2016

At The Hague, The Netherlands